A CASE FOR THE ESTABLISHMENT OF OIL SPILL LIABILITY TRUST FUND IN NIGERIA

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Abstract

Oil spillage has plagued Nigeria since petroleum operations began in the country. The problem is often overpowering especially in cases where the spill arises from acts of strangers or ageing pipelines. In a bid to manage the situation, relevant statutes and administrative regulations on the subject were prompted, with provisions for compensation of the victims of oil spillage and penal sanctions for negligence of oil companies. However, the inadequacy of compensatory provisions in the relevant legislation, strict requirement for proof of negligence, the question of locus standi in the tort of public nuisance, and the multiplicity of defences available to defendants in cases involving oil spillage have all combined to defeat the objectives of the reversal efforts put forth in Nigeria. In the long run, the affected environments and the host communities have been the worse for it. This paper is predicated on the background of the foregoing. Accordingly, the paper will show that the establishment of an Oil Spillage Liability Trust Fund in Nigeria is both timely and inevitable if effective remediation of the impacted environment will ever be possible. In the main, it will be shown that the operation of an Oil Spill Liability Trust Fund is ultimately both time and cost effective in the restoration of the environment and compensation of individuals adversely affected by oil spillage. It will also be shown that the functions of National Oil Spill Detection and Response Agency, vested with the responsibility to co-ordinate the implementation of the National Oil Spill

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Contingency Plan (NOSCP) for Nigeria, in accordance with the International Convention on Oil Pollution Preparedness, Response and Co-operation (OPRC) 1990, can only be effectively carried out with the availability of stable funding. In so doing, the long essay will consider relevant legislation governing liability for oil spillage in Nigeria, as well as the applicable enforcement mechanisms. A critical review of the NOSDRA Act will also be undertaken with a view to bringing out its inherent limitations in coping with the overwhelming intricacies of oil spillage in Nigeria.

Keywords: Oil Spillage, Trust Fund, Liabilities, Host communities, Nigeria

Introduction

Oil spillages, which occur randomly in countries where petroleum operations are carried out in commercial quantity, have prompted global concerns mainly due to the extent of devastations effectuated on the affected environments. In recent times, the harm occasioned by this source of environmental pollution has been identified as the greatest single environmental problem all over the world.[1] Apart from the fact that its occurrence is multidimensional, the impact of oil spillage is both crosscutting and overwhelming. This has necessitated the global efforts made by oil rich nations in controlling oil pollution. The efforts put forth by Nigeria via its laws however seem grossly inadequate in measuring up with the overpowering intricacies of oil spillage, especially in the aspect of remediation of the impacted environment.

Nigeria is both blessed and unfortunate to be an oil rich nation. Blessed because petroleum contributes largely to Nigeria's gross domestic product (GDP) and ultimately, national income; unfortunate because Nigeria has been hit severally and severely by oil spillage. Expectedly, the nation has borrowed leaf[2] as well as joined efforts in the ensuing global fight against oil pollution by establishing liabilities for the act.[3] Such liabilities include

1 Smart Uchegbu, *Issues and Strategies in Environmental Planning and Management in Nigeria*,(Enugu: Spotlite Publishers, 2002), 31.

2 Most of our laws governing liabilities of oil pollution are modelled after foreign legislation on the point. Nigeria is also a signatory to many conventions regulating environmental liabilities.

3 That is, the act of oil pollution.

common law claims for bodily and property damage for exposure to pollutants; prosecutions for environmental offences and civil liability for remediating polluted water and contaminated land.[4]

With the aforementioned mechanisms, one would expect that the impact of oil spillage should have remained of little concern or abated considerably. But that is not so. Records available indicate that cases of oil spillage in Nigeria still appear intractable.[5] Certain factors are responsible for the continued intractability of oil spill cases in Nigeria. One is the multiplicity of defences available to oil polluters in our laws.[6] Another factor is the obstacles[7] posed by judicial technicalities which often release the culprits without more, and then, the inadequate provisions in our laws in taking both responsive and proactive measures in effecting the remedial and reversal actions intended by the lawmakers.

On the whole, it will be seen that the world has gone many miles ahead of Nigeria in dealing with oil spillage case s[8]. In realization of this fact and, perhaps, in an effort which appears proactive, Nigeria in 2006 established the National Oil Spill Detection and Response Agency Act (NOSDRA). A careful examination of the said Act however reveals its inherent redundancy and ineffectuality. Not only that the scope of the function and jurisdiction of the Act is grossly limited, the *scarce* provision for the fund available to the agency[9] is such that cripples its activities in responding to emergency situations. Thus, by the tenor of the Act, the agency cannot carry out a

4 Valerie Fogleman, "The Widening Gap in Cover for Environmental Liabilities in Public Liability Policies", *Journal of Planning & Environmental Law*, J.P.L (2007) June, pp. 816-825 at 816.

5 For instance, *Centre for Oil Pollution Watch v. Nigeria National Petroleum Corporation* (2013) LPELR-20075(CA). See also, "Third Oil Spill In 3 Months At Mobil's Qua Iboe Field"(November 12, 2012) <http://www.informationng.com/tag/nosdra> accessed March 16, 2023

6 Such as the acts of a stranger; beneficial nature of oil mining; requirement of expert evidence in proving negligent conduct of the polluter, etc.

7 Chief of which is the *locus standi* of the plaintiffs.

8 In the US, for instance, an Act, the Oil Pollution Act 1990 (OPA) has been established with the sole aim of addressing the issues associated with preventing, responding to, and paying for oil pollution. A key provision in the OPA is the Oil Spill Liability Trust Fund (OSLTF), created to pay for expeditious oil removal and uncompensated damages. See generally "Summary of the Oil Pollution Act", <https://www.epa.gov/laws-regulations/summary-oil-pollution-act> accessed March 16, 2023.

9 That is, the National Oil Spill Detention and Response Agency.

clean-up exercise in the event of pollution without involving the company liable for the act, since it has limited power and, essentially, the fund to do so. These inherent incapacitations prompted the effort in this work.

Impact of Oil Spillage in Nigeria

Oil leaks are usually from high pressure pipelines, and therefore spurt out over a wide area, destroying crops, artificial fishponds used for fish farming, "economic trees" and other income generating assets.[10] Even a small leak can wipe out a year's food supply for a family, with it wiping out income from products sold for cash. The consequences of such colossal loss of livelihood can range from children missing school because their parents are unable to afford the fees to virtual destitution.[11]

The impact of an oil spill depends on the size of the spill, the rate of the spill, the type of oil spilled and the location of the spill and can cause damages over a range of time scales, from days to years, or even decades for certain spills.[12] This is because oil, being a fluid, has the capacity to flow extensively, and can spread for hundreds of miles which can cover beaches with a thin coating of oil.[13] This can kill sea birds, mammals, shellfish and other sea organisms and human beings as well[14] When this happens, access of the host communities to clean water is not only disturbed, their rights to fishing and other aquatic activities are also infracted. Thus, in *Shell v. Helleluja Fishermen Multi-Purpose Co-Operative Society Ltd,*[15] the respondent sued the appellant in the High Court of Rivers State in a writ of summons claiming the sum of One Hundred and Sixty-Two Million, Eight Hundred Thousand Naira (₦162,800,000.00) for damages suffered by the plaintiff as a result of crude oil spillage from the defendant's crude oil well and other oil installations which extensively

10 Ayodele O. Akinsola, "Civil Liability for Oil Pollution Under Nigerian Law", <http://www.nials-nigeria.org/journals/Ayodele%20Oladiranlawp.pdf> accessed on June 04, 2021.

11 Ibid.

12 "Oil Spillage: Liability and Regulatory Framework", <http://thelawyerschronicle.com/oil-spillage-liability-and-regulatory-framework> accessed on June 1, 2022.. See also the Jesse oil Explosion, where hundreds of the indigenes of the Kingdom of Jesse were reportedly killed from the oil spill. See generally, "Energy Mix Report", <http://energymixreport.com/jesse-community-seeks-compensation-16-yrs-pipeline-explosion> accessed on June 04, 2023..

13 Ibid.

14 Ibid.

15 (2001) LPELR-5168(CA).

polluted the plaintiff's fish ponds, fishing nets, and the creeks and rivers wherein the plaintiff carries on its large scale commercial and modern fishing and fish farming. The case was however struck out for want of *locus standi* on the part of the respondent.

Also, in *Mobil Producing (Nig) Unltd v. Chief M.A. Ajanaku & Ors*[16], the plaintiffs in this case instituted an action in the Federal High Court in a representative capacity on behalf of registered fishing co-operative societies and/or 272 communities whose members and peoples inhabit the coastal settlements and villages on the shores of the Atlantic Ocean. The Plaintiffs averred that their only occupation was fishing and fish farming which they carried out in the waters of Life and from which they earned 99 percent of their income. They also averred in their statement of claim that the Waters of Life was pivotal to the life support systems of the plaintiff and also fundamental to their socio-economic well-being, and depended wholly on the Waters of Life for domestic needs and uses, including cooking, bathing and washing. On about January 10, 1998, the pipelines ruptured and burst and resulted in the spillage of over 7.6 million litres of crude oil into the Atlantic Ocean and their environment, adversely affecting the socio-economic development of the inhabitants of the areas of impact. The plaintiffs in this case complained that, years after the spill, the defendant was reluctant in carrying out a post-impact assessment or remediation effort and thus leaving the inhabitants of the impact site greatly impoverished. While the action was pending in the Federal High Court, however, the appellant brought an application for a stay of proceeding on the ground that, among other things, the action had been statute barred. The application was however rejected by the Court of Appeal upon a proper consideration of the impact of the spill on the respondents. This case throws more light on the attitude of oil companies in responding to the impacts of oil spillages resulting from their operations. Their usual tactics have always been to truncate an action against their liabilities on the basis of technicalities without any remorse to the pitiable condition of the victims of oil spill.

Liabilities for Oil Spillage Resulting from Petroleum Operations

Basically, liabilities for oil pollution are imposed under the relevant legislation regulating the oil sector, as well as by the application of the

[16] (2007) LPELR-8758(CA).

common law rules[17]. Under the first heading, liabilities can only arise when there are contraventions to the provisions of an enactment relating to a particular petroleum operation, liabilities which are usually enforced by the relevant administrative authorities with an attempt to remedying the environment.[18] Under the second heading, liabilities would arise when there are violations of common law rules relating to tortuous liabilities[19] by petroleum operators. Affected victims of oil spillage usually bring an action for compensation only.

With respect to mining activities, for instance, the duty of overseeing and regulating the conditions for petroleum operations is vested in the Minister of Petroleum Resources. The Minister is vested with the power to revoke licenses in cases of non-conformity with the prescribed "good oilfield practice."[20] Under section 9(1)(b)(iii) of the Petroleum Act, the Minister is empowered to make regulations for the protection of the environment from oil production operations. Pursuant to this power, a number of regulations were made in 1969, which includes Petroleum (Drilling and Production) Regulations 1969[21]. In Regulation 25[22], it is provided that:

> The licensee or lessee shall adopt all practicable precautions, including the provision of up-to-date equipment approved by the Director of Petroleum Resources, to prevent the pollution of inland waters, rivers, watercourses, the territorial waters of Nigeria or the high seas by oil, mud or other fluids or substances which might contaminate the water, banks or shoreline or which might cause harm or destruction to fresh

17 See E. O. Ezike, "Remediating Environmental Damages in Nigeria: Need to Adopt the Principle of Absolute Liability", *Nigerian Journal of Petroleum, Natural Resources and Environmental* Law, Vol. 3, No. 1(2011) 1-30.

18 Edith Nwosu, "Petroleum Legislation and Enforcement of Environmental Laws in Nigeria", *Nigerian Juridical Review*, Vol. VI (1999) 80-108.

19 See for instance Emmanuel Onyeabor, "Application of Common Law Principles in Adjudicating Water Pollution Violation: A Rethink" *Petroleum, Natural Resources and Environmental Law Journal*, Vol. 1 no. 1(2009) 87-108.

20 See Paragraph 24 of the first schedule to Petroleum Act. See also Benson Oloworaran, "Liability for Compensation for Oil Spillages Resulting from the Act of Strangers/Third Parties", *Petroleum, Natural Resources and Environmental Law Journal*, Vol. 1 No. 1(2009),.

21 E. O. Ezike, "Liabilities for Environmental Pollution Damage in Nigeria", *The Journal of Private and Property Law*, Vol. 23(2010) 78.

22 Petroleum (Drilling and Production) Regulations 1969.

> water or marine life, and where any such pollution occurs or has occurred, shall take prompt steps to control and, if possible, end it.

Similarly, under Regulation 37[23], which mandates the licensee or lessee to maintain all apparatus and appliances in use in his operations.[24]

It should be noted that the penalty or liability to be incurred under the Act is revocation of the license or lease in accordance with Paragraph 25(1)(b) of the first schedule to the Petroleum Act.

With respect to liabilities arising from oil transportation by pipelines, it is provided in section 17(4) of the Oil Pipelines Act[25] that:

> Every licence shall be subject to the provisions contained in this Act as in force at the date of its grant and to such regulations concerning public safety, the avoidance of interference with works of public utility in, over and under the land included in the licence and the prevention of pollution of such land or any waters as may from time to time be force.

The provision above is a precautionary regulation, rather than a remediation measure. And thus, under section 17(1) of the Act, it is provided that the duration of the license under the Act shall be a period not exceeding twenty years. It has been suggested[26] that this provision is in recognition of the fact that the nature of the pipelines may make them less fit for use due to corrosion or other wear and tear. This paper however argues otherwise. This is because, an expiration of a pipeline licence does not necessarily include expiration of pipelines themselves, and there are no conditions in the Act stipulating that a renewal of such licence has the renewal of pipelines as a condition precedent. Available cases also[27] suggest that oil companies

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23 Ibid.

24 See also Regulations 41 and 46, Petroleum (Drilling and Production) Regulations 1969.

25 This is an Act to make provision for licences to be granted for the establishment and maintenance of pipelines incidental and supplementary to oilfields and oil mining and for purposes ancillary to such pipelines.

26 M. M. Olisa, *Nigerian Petroleum Law and Practice*, 2nd Ed.(Lagos: Jonia Ventures Ltd, 1997) 164.

27 See for instance *Walter Okoni v. Nigerian Agip Oil Co. (Nigeria) Ltd (supra)* , where the appellant noted that the oil spill was as a result of ruptured pipelines. See also

hardly change their pipelines notwithstanding the above provision. In fact, in *Isaiah v. The Shell Pet Dev Co Nigeria Ltd*[28], it was found that the spillage and pollution occurred when the appellant was trying to repair the indented pipeline by cutting off the said section and installing a new section,[29]a clear indication of the bad condition of the pipelines before this time. Howbeit, civil liabilities under the Act are imposed under section11. By section 11(5), the holder of an oil pipeline license shall pay compensation to any person whose land or interest in land is injuriously affected by the exercise of the rights conferred by the licence.

It has been equally asserted that this provision relating to compensation is under-utilized by the oil communities due partly to ignorance of the victims[30]. It is believed that if proper awareness is given to the said provision, it will provide a rapid consolation to the victims of oil pollution who are seeking compensation for damage occasioned by oil spillage from pipelines. At any rate, such compensation usually ends up mitigating the economic losses of the victims without including a penalty to clean-up the affected environment.

Likewise, under the Oil in Navigable Waters Act,[31] liabilities are imposed for petroleum operations involving transportation and/or exportation of oil. Section 1 of the Act makes it an offence to discharge crude oil into prohibited sea areas. The prohibited sea areas are areas designated by the Minister in charge of Transport as such. Section 2 equally makes it an offence to discharge oil or any mixture containing oil into waters or land. Notwithstanding the offences created under the Act, the liability to be incurred therefrom is a paltry fine of two thousand Naira. This sum has been severely criticized for being too paltry as to have any deterrent

Smart Uchegbu, note 27 above, where the author contended that the oil spill resulting from pipeline leakage is as a result of old and worn out pipelines which due to old age start leaking oil.

28 Supra.

29 At pp 179-180.

30 Nwosu, (n 18). 88.

31 Cap . O6, LFN 2004.

effect[32]. The Act has also been trenchantly criticized for containing numerous defences[33] which negate its usefulness.[34]

There are other pieces of legislation[35] regulating the environment generally, under which a polluter can be held liable for oil spillage. However, these regulatory laws have been all together criticized for a number of reasons. Benson[36] for instance believes that the existing municipal laws dealing with environmental issues are defective in providing positive means for remediation in spillages caused by strangers. The learned author also argued that some of the laws[37] create loopholes and make deliberate discharge of oil into the environment excusable in particular circumstances and without regard to its resultant hazardous effect. Ezike[38] on the other hand argues that the relevant laws only create strict liability and not absolute liability on the oil companies, the result of which is that polluters escape liability by pleading any of the defences available under the strict liability actions. The learned author thus believes that the adoption of the doctrine of strict liability, as is the case with India, will provide a way out of the inadequacies of the relevant laws.

Critiquing the Option of Absolute Liability in Oil Spill Cases

There is no doubt that our legal regime on oil pollution is fraught with loopholes, but adopting the absolute liability doctrine does not provide any enduring solution in the face of the unfolding events such as the intransigent and recurring acts of militancy in the country.

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32 C. E. Emole, "Regulations of Oil and Gas Pollution", *Environmental Policy and Law* Vol. 28 No. 2(1998) 105.

33 See section 4 for instance, which provides special defences under sections 1, 3, and 5, Oil in Navigable Waters Act.

34 See Ezike, (n 21).

35 The Criminal Code, section 245; Environmental Impact Assessment Act Cap 12, LFN 2004; National Environmental Standards and Regulations Enforcement Agency (Establishment) Act, 2007, which replaced the Federal Environmental Protection Agency Act Cap F10 LFN 2004; Harmful Waste(Special Criminal Provisions etc) Act Cap H1 LFN 2004, etc.

36 Oloworaran, (n 20) 76-77.

37 Oil in Navigable Waters Act.

38 Ezike, (n 21)17-18.

It should be noted that, having the doctrine of absolute liability enshrined in our laws[39] only implies that, once there is a spill resulting from petroleum operations, there will be no room to plead any of the defences available in the laws. Thus, polluters will be absolutely and automatically held liable for any such spillage. But the poser is: to what extent will the oil companies be liable under the examined laws?

It has been shown above that, the effect of founding liability under the Petroleum Act is the revocation of the license or lease. This does not in any way help in providing an opportune solution to the problem. Moreover, revocation of licenses or leases assist in undermining the Nigerian government's effort to provide incentives in the oil industry, and the economic implications which may make the application of such revocation provisions unrealistic.[40] Similarly, founding liability under the Oil in Navigable Waters Act only means payment of a fine which is rather too paltry, as agued above. Even the compensation payable under the Oil Pipelines Act will only help in settling the victims and leaving the damaged environment unattended to. Ultimately, then, the most that the doctrine of absolute liability will achieve if enshrined in our present laws will be to help secure compensation for the victims. This makes the option a rather weak one and without any enduring benefit.

Sources of Claims and Riparian Rights in Oil Spillage Cases

Cause of action arises where one's right is affected by the deliberate or negligent act of another person. For an oil pollution victim, recourse must be had to litigation in order to enforce his rights and claim compensation for damages occasioned by oil spillage. Common law plays an important role in enforcement of such infracted rights. This is because, while the criminal liability is primarily concerned with punishing the polluter, the common law provides the principal means by which victims of oil spillage may claim compensation.[41]

Causes of action for oil spillage can arise under the torts of nuisance, negligence, *trespass* and the rule in *Rylands v. Fletcher*.[42] However, to

39 As in section 14 of the Indian Gas Act 1965, which imposes absolute liability for damages caused by gas escaping from underground storage. See Ezike, (n 21)71.

40 Nwosu, (n 18) 86.

41 See Onyeabor, (n 19).

42 Ibid.

bring an action under the common law of tort, a litigant must predicate such claims on property rights arising from ownership of land. Therefore, for a right of action to accrue to a land owner to pursue oil pollution claims, he must show that his right to abstract water has been affected[43].

Claiming damages to pollution of water by oil spillage may be seen as impossible to the claimant, as waters and rivers may be said not to be capable of private ownership. All the same, the concept of riparian ownership comes to aid.

Riparian rights arise where a person owns land adjoining to a river or a stream. Such ownership includes the bed of the river or a point equidistant from his neighbour on the opposite side, but does not include the river itself.[44] The relevance of this to oil pollution cases is that, where a river has been polluted by an oil spill, the right of persons cannot be denied simply because they cannot claim ownership of the river so polluted. Thus, the concept of riparian ownership enables them to bring claims upon pollution of the rivers.

But then, oil spill in many cases also extend to lands, crops, economic trees and even buildings of host communities.[45] In such instances, proof of damage to the property in question is sufficient to ground an action under the common law of tort.

Customarily, damage to property and personal injury occasioned by oil exploration, exploitation, transportation and distribution could lead to liability in tort.[46] However, claiming under the common law of tort in cases of oil pollution is rather a nightmare to the oil spillage victims. In claiming damages under the law of nuisance, for instance, the claimant has to prove neglect conduct on the part of the oil company, failure of which may amount to his losing in the law suit. Most of the victims of oil pollution do not have the financial wherewithal to procure an expert witness for the reason of proving negligence in the conduct of oil operations by the

43 Ibid.

44 *Amachree v. Kalio(1914)*2 NLR, *Braide & Ors v. Adoki & Ors.(*1931)10 WLR p.15.

45 See *Shell v. Anaro & Ors.* (2015) LPELR-24750(SC) where the plaintiffs claimed for compensation for damages done to their farm lands, crops and rivers amongst others, by reason of oil spillage resulting from the negligence of the defendant.

46 Oloworaran, (n 20)76-77.

defendants. In many cases, the oil companies go scot free for the penury of the claimant.

Where a section of the public is affected, an action could be brought under public nuisance.[47] Claiming under public nuisance however presents its own peculiar challenges. The law, for instance, requires the Attorney-General to institute an action where a public right has been violated.[48] To get the Attorney-General of a State for instance to institute an action involving oil spillage is rather a herculean task, considering that the cases lining up in the office of the A.G. are ever increasing in leaps and bounds.[49] However, it has been suggested[50] that the obstacle of relator action has been removed by virtue of the Supreme Court decision in *Adediran v. Interland Ltd*.[51] All the same, the claimant still has to show that he has suffered specific and substantial damage over and above other members of the public.[52]

Alternatively, actions could still be brought in representative capacity. For claimants to be successful, however, they must comply with the strict requirements thereof.[53] The claimants must thus have a common interest; there must be a common grievance and the relief claimed must be beneficial to all.[54] In *Shell v. Graham Otoko & Ors.*,[55]the Respondents sued in a representative capacity for injurious affection to and deprivation of the use of the Adoni River and Creek, and desecration of their shrines, pollution of drinking water and destruction of fish and other living creatures in the river, which resulted from oil spillage caused by the negligence of the Appellant. The lower court found in favour of the claimants and awarded the sum of ₦491,700 as damages. On appeal, the Court of Appeal upturned the decision of the lower court and held that the six villages represented were not one community and that the spillage injuriously affected persons with different interests.

A claimant may also bring an action for oil spillage under the rule in *Rylands v. Fletcher*. Accordingly, in Machine *Umudje v. Shell B.P.*

47 Oloworaran, (n 20) 75.
48 See sections 174 and 211 of the 1999 Constitution.
49 Nwosu, (n 18) 99.
50 Ezike, (n 21) 14.
51 (1991) 9 NWLR (Pt. 214) p.164.
52 *Adediran v. Interland* (supra).
53 Onyeabor, (n 19) 101.
54 *Oganioba v. Oghene & Ors. (*1961)1 NLR p.115.
55 (1990)6 NWLR (pt.159) 693.

Petroleum Development Company,[56]the rule was applied to hold the defendant liable for the escape of crude oil from the premises of the defendant, destroying the claimant's fish and fishpond. It has been noted that the rule in *Rylands v. Fletcher* has been watered down to the level of insignificance due to the multiple defences available to the defendant.[57] Thus, apart from the internal hurdle one has to jump in observing and applying the components[58] of the rule, an oil polluter will escape liability by proving that the escape was an act of God, act of a stranger, or that he has a statutory authority or that there plaintiff contributed to the negligence. The implication of the above is that, where the spillage is as a result of the acts of militants, oil companies will go scot-free and the victims of the polluted environment will be left in the harm occasioned. There is also another exception admitted by the rule. In *Anderson v. Oppenheimer*[59] it was held that the rule in *Rylands v. Fletcher* was not available to the plaintiff as the water complained of was of a beneficial interest to both parties. The implication of this is that, since crude oil is for the benefit of all Nigerians, oil companies will always circumvent this rule by pleading the common benefit principle. Action in Negligence is also available, however, the claimant must establish that the oil polluter was negligent in the exercise of his duty of care. It has been observed that proof of negligence is an uphill task for the victims of oil pollution who cannot match the expert evidence usually procured by the oil companies.[60] A claimant may however bring an action under all of these heads and plead them in the alternative,[61] but the he has to fulfil the individual requirements of each of them, otherwise he will go empty handed as in the case of *Shell v. Graham Otoko & Ors.*[62]

To make matters worse, after going through the hell of sustaining action under the common law, the sum payable to a successful claimant is nothing

56 (1975)911 SC 155.
57 Ezkie, (n 21) 12.
58 Such as: what amounts to non-natural user, escape and the nature of the thing that escaped. LR H.L.330.
59 CA 1880.
60 Nwosu, (n 18) 102.
61 *Umudje v. Shell B.P. Petroleum Development Company (supra).*see also *Shell v. Anaro*(supra), where it was held that a single act of a defendant can give rise to liability under two separate heads of tort.
62 (Supra), where the plaintiff lost the case in spite of the alternative pleadings of the heads of torts.

commensurate to his loses. In the 2015 case of In *Shell v. Anaro & Ors.,*[63] the Plaintiffs sought damages from Shell Development Company of Nigeria Limited for oil spillage. The case commenced in 1985 but was decided in favour of the plaintiffs in 2015 -30 years after! Despite this undue delay, the court only awarded each of the plaintiffs N500, 000(five hundred thousand Naira only).[64]

Until recently, actions could not be brought under human rights in matters respecting environmental pollution in Nigeria. This is because, not only that right to a clean environment is not included as a fundamental human right under Chapter IV of the 1999 Constitution, its inclusion in section 20 of the 1999 Constitution, and therefore under chapter II subjects matters which have been made non-justiciable by virtue of section 6(6)(c) of the 1999 Constitution, rendered it an impotent tool. Howbeit, recent judicial innovations have made it possible for victims of oil pollution to bring an action under the fundamental human rights.

In *Comer v. Murphy Oil USA*[65], the plaintiffs allege defendants' operation of energy, fossil fuel and chemical facilities in the United States contributed to global warming through the emissions of GHGs, which caused sea levels to rise and, which, in turn, added to the ferocity and intensity of Hurricane Katrina. The District Court dismissed, ruling both that plaintiffs had no standing and that the claims were really non-justiciable political questions. The United States Courts of Appeals for the Fifth Circuit, reversing the decision of the federal district court, held the plaintiffs, residents and owners of lands and property along the Mississippi Gulf Coast, can assert claims against oil, coal and chemical defendants for property damages resulting from Hurricane Katrina.[66] Also, in *Andhra Pradesh Pollution Control Board v. MV Nayudu,*[67] the Indian Supreme Court held that the

63 (2015) LPELR-24750(SC)

64 See also the case of *R. Mon & Anor. V. Shell B.P* (1970-72)1 R.S.L.R. 71, where the court awarded N200 only as damages to the plaintiffs. See Nwosu, (n 18) 103.

65 No.07-60756 (5th Cir. Miss. Oct. 16, 2009), <http://www.lexology.com/library> accessed on June 04, 2021.

66 See also *Urgenda Foundation v. The State of the Netherlands,* ECLI:NL:RBDHA:2015:7196,http://uitspraken.rechtspraak.nl accessed on June 4, 2022.

67 (1999)2 SCC 718, cited in B. A. Oloworara, The Right to a Clean and Healthy Environment and the Fundamental Human Rights Provisions of the Federal Republic of Nigeria, 1999,

right to life protected under section 21 of the Indian Constitution protects environmental rights.[68]

In the Nigerian case of *Gbemre v Shell & Ors*.[69], the plaintiff sought a declaration that the constitutionally guaranteed fundamental rights to life and dignity of human person provided in sections 33(1) and 34(1) of the 1999 Constitution and reinforced by articles 4, 16 and 24 of the African Charter on Human and Peoples' Rights, inevitably include the right to clean poison-free, pollution-free and healthy environment, and that the actions of the 1st and 2nd respondents in continuing to flare gas in the course of their exploration and production activities in the applicant's community is a violation of their fundamental rights to life (including healthy environment) and dignity of human person. Federal High Court held that that the actions of the Respondents in continuing to flare gas in the course of their oil exploration and production activities in the Applicant's community was a gross violation of their constitutionally guaranteed rights to life (including healthy environment) and dignity of human person.

This case would have settled some problems in oil pollution litigation especially the problem of unrestricted right of action. However, the courts in Nigeria have not been uniform in their pronouncements on the right to a clean and healthy environment as part of the constitutionally protected right to life.[70] Thus in the case of *Okpara v. Shell*[71], though with similar facts[72], the court struck out the case, holding that the action of the defendants cannot be maintained in a representative action and thus upheld the submission of the defendant counsel that the suit was incompetent for wrong cause of action.

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68 See also *Minerva Mills v Union of India*(1980) AIR (SC) 1789, where the Indian Court elevated the Constitutional status of the Directive Principles(cited in Emeka Amechi, 'Litigating Right to Healthy Environment in Nigeria: AN Examination of the Impacts of the Fundamental Rights (Enforcement Procedure) Rules 2009, in Ensuring Access to Justice for Victims of Environmental Degradation', <http://www.lead-journal.org/content/10320.pdf> accessed on June 4, 2023.

69 (2005) AHRLR 151 (NgHC 2005).

70 Oloworaran, (n 20)80.

71 Suit No. FHC/PH/CS/518/2005, Unreported decision of the Federal High Court, Port Harcourt, decision on September 29, 2006, cited in Benson Oloworaran, (n 20) 53.

72 See Oloworaran, (n 20)54.

It has been suggested[73] that the Nigerian courts should borrow a leaf from its counterparts in other jurisdictions and either transfer environmental matters to Chapter IV of the Constitution as is the case in India, or allow an elaborate interpretation of same. Until this is done, however, this option is not readily available for claimants in Nigeria.

The foregoing analysis goes to prove one thing: our laws as examined above are not capable of remediating environmental pollution, whether under the statute books or under the common law principles, due primarily to the challenges associated therewith. It has also been seen above that the almighty fundamental proceeding is of no ready help to oil pollution victims as environmental matters are not only excluded from the first generational rights but are also made non-justiciable by virtue of its inclusion in chapter II of the 1999 Constitution. Bearing this in mind, the totality of the intricacies surrounding liabilities for oil pollution leaves the effects of oil spillage unabated in Nigeria.

In 2007, the Nigerian government established the National Environmental Standards, Regulations and Enforcement Agency (NESREA),[74] as the enforcement Agency for environmental standards, regulations, rules, laws, policies and guidelines,[75] mandated to enforce compliance with policies, legislation and guidelines on water quality, environmental health and sanitation including pollution. The Agency thus became a major body charged with environmental protection in Nigeria.[76] It has been noted however that the functions of the Agency are directed at the prevention of pollution and environmental harm rather than remedying the harm that has already occurred.[77] All the same, where the pollution is already occurring, the Agency is empowered by the Act to enforce its abatement.[78]

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73 Ibid.

74 The Agency was established by virtue of section 1 of the National Environmental Standards, Regulations and Enforcement Agency Act 2007, which repealed Federal Environmental Protection Agency (FEPA) Act, cap. F10 LFN 2004 by virtue of section 36 of the Act.

75 Ibid, section 1(2)(a).

76 Ezike (n 21).

77 Ibid.

78 See M. T. Ladan, *Law, Cases and Policies on Energy, Mineral Resources, Climate Change, Environment, Water, Maritime and Human Rights*, (Zaria: ABU press Ltd, 2009), pp. 367-368, cited in E. O. Ezike, (n 21) 68.

The NESREA Act however has appreciable provisions for offences and penalties. For instance, under section 27(1) of the Act, discharge of harmful substances upon the land and the waters of Nigeria or at the adjoining shorelines is prohibited. Penalty for violation of the provision includes a fine not exceeding ₦1,000,000 or an imprisonment for a term not exceeding 5 years.[79]

Additionally, another appreciable provision of the Act is found under section 28. The section provides that for the purpose of implementing the provisions of the Act, the Minister shall by regulations prescribe any specific removal method, financial responsibility level for owners or operators of vessels, or onshore or offshore facilities notice and reporting requirements. This principle accords with the polluter pays principles and provides a better remedial provision for environmental pollution. Further, under section 29, the Agency is to co-operate with other Government agencies for the removal of any pollutant shall enforce the application of best clean-up technology currently available and implementation of best management practices as appropriate.

The above provisions of the Act would have remained a watershed in oil pollution management but for the exclusion clauses limiting the activities and functions of the Agency in pollution matters to areas other than the oil (and gas) sector.

For instance, section 7(g) of the Act provides that the Agency shall enforce compliance with regulations on the importation, exportation, production, distribution, storage, sale, use, handling and disposal of hazardous chemicals and waste *other than in the oil (and gas) sector*.[80] Also, in section 29 of the Act, it is provided that the Agency shall co-operate with other Government agencies for the removal of any pollutant *excluding oil (and gas) related ones discharged into the Nigerian environment*[81]and shall enforce the application of best clean-up technology currently available and implementation of best management practices as appropriate. The implication of the foregoing is that all environmental matters such as oil

[79] Section 27(2), NESREA Act.
[80] Emphasis mine.
[81] Emphasis mine.

spillage arising from petroleum operations have been removed from the authority of NESREA.[82]

It has been suggested that the exclusion of the NESREA from oil pollution matters in the oil sector is an attempt to resolve the conflict between the defunct FEPA and the Petroleum Inspectorate Department of the Ministry of Petroleum Resources (PIDPR).[83] The said conflict sprouted after the establishment of FEPA.[84]

Prior to the creation of FEPA, the PIDPR had been responsible for monitoring pollution in the petroleum sector[85]. Some years after FEPA was established, a controversy arose as to which of the two bodies was the appropriate authority for setting standards for pollution control in the oil and gas industry as well as which was to enforce the regulations.[86] Efforts were made to resolve the conflicts, but they yielded no lasting result until FEPA was repealed by NESREA with the later being divested of all powers over the activities relating to the pollution in the oil and gas sector.[87] Contrary to the opinion expressed above, it is believed that the reason why NESREA was deprived of the authority over oil matters is because of an already existing Agency.[88] A careful examination of the NOSDRA Act would reveal that the lawmakers' intention is to have the NOSDRA seized of the responsibility pertaining to the environmental pollution emanating from petroleum operations.[89] It is believed that if there has been such a body as NOSDRA existing by 2006, it will be unnecessary duplication of functions to extend the powers of NESREA to oil spillages emanating from the oil industry. In effect, the problem that existed would resurface.

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82 Ezike, (n 21)69.

83 Ibid.

84 Ibid.

85 Ibid.

86 Ibid.

87 Ibid.

88 The National Oil Spill Detection and Response Agency, established by the National Oil Spill Detection and Response Agency Act, 2006. It is also argued that same applies to pollution arising from the gas industry as the Gas-Reinjection Act has covered the activities of gas flaring and the like.

89 See sections 1 and 6 of the NOSDRA Act. See also K. Ezeibe, "The Legislative and Institutional Framework of Environmental Protection in the Oil and Gas Sector in Nigeria – A Review," *Nnamdi Azikiwe University Journal of International Law and Jurisprudence,* Vol 2 (2011),<http://www.ajol.info/index.php/naujilj/article/view/82386> accessed May 25,2021.

Under section 7(c) of NESREA Act, however, NESREA's powers were extended to the oil and gas sector. The section however limits this extension to matters respecting the enforcement of compliance with the provisions of international agreements, protocols, conventions and treaties on the environment, a function which is not covered under the NOSDRA Act.

A Review of the National Oil Spill Detection and Response Agency Act

Perhaps, the growing ineffectiveness of the existing relevant laws in regulating oil spillage in Nigeria prior to 2006 must have prompted the Nigerian government to come up with the National Oil Spill Detection and Response Agency (NOSDRA) Act, 2006.[90] This is not unexpected, as the oil and gas sector has been noted to as a tertiary producer of environmental hazards hence requiring special treatment t,[91] more so that the challenge has remained intractable. The Act is thus a specialized and principal legislation on environmental protection in the oil and gas sector,[92] establishing the National Oil Spill Detection and Response Agency.[93] The act also established the advisory, monitoring, evaluating, mediating and co-ordinating arm of NOSDRA known as the National Control and Response Centre (NCRC)[94]. It has been pointed out[95]that the constitution of the Governing Board of the Agency[96] and the operational modus of the Agency in the event of major or disastrous oil spill[97] takes into account the multi-sectoral demand of environmental protection in the oil and gas sector. Accordingly, the NOSDRA Act provides that the objectives of NOSDRA

90 In compliance with the International Convention on Oil Pollution Preparedness, Response and Co-operation (OPRC) 1990

91 Ezeibe, note 111 above, p.39.

92 Ibid, p. 44.

93 Section 1, NOSDRA (Establishment) Act, 2006.

94 Section 18, ibid.

95 Ezeibe, note 111 above, p.44.

96 Section 2(1) &(2); established the Governing Board and equally listed the composition of the Board; one might observe that of all the relevant stakeholders delineated in the Second Schedule, the Ministries of Health and that of Science and Technology have no representation on the Board. See Ezeibe, note 111 above.

97 Section 19(1) &(2); Section Schedule to the NOSDRA Act: provides the functions of all the Ministries or Agencies which NOSDRA shall co-opt and collaborate with in the event of any major or disastrous oil spill (i.e. for major Tier 2 or Tier 3 oil spill). NB: In Nigeria Oil Spill is classified into 3 tiers, Tier 1 – Oil Spill of less than or equal to 7 tonnes (i.e. 50 barrels); Tier 2 – Oil spill greater than 7 tonnes but less than 700 tonnes (5000 barrels); Tier 3 oil spills greater than 700 tonnes; strategic response to each tier varies in the Plan, i.e. National Oil Spill Contingency Plan. Ezeibe, note 111 above.

shall be to co-ordinate and implement the National Oil Spill Contingency Plan for Nigeria.[98]

The National Oil Spill Detection and Response Agency (the Agency), is thus charged with the responsibility for preparedness, detection and response to all oil spillages in Nigeria as set out in section 5 of the Act.[99] and can sue and be sued in its corporate name.[100] It has been argued that the effectiveness of the NOSDRA has been greatly hampered by lack of criminal provisions in the Act.[101] An assessment of the objectives, powers and functions of the Agency seems to suggest otherwise.

Under section 5, it is provided that the objectives of the Agency shall be to co-ordinate and implement the National Oil Spill Contingency Plan for Nigeria. The plan includes: safe, timely, effective and appropriate response to major or disastrous oil pollution. The Agency also has as an objective to identify high-risk areas as well as priority areas for protection and clean-up, establish the mechanism to monitor and assist or where expedient direct the response, including the capability to mobilize the necessary resources to save lives, protect threatened environment, and clean up to the best practical extent of the impacted site.

In furtherance of the objectives of the Agency established under section 5, the Act in section 7 provides for the functions of the Agency. As stipulated under the section, the Agency is to:

(a) be responsible for surveillance and ensure compliance with all existing environmental legislation and the detection of oil spills in the petroleum sector;

(b) receive reports of oil spillages and co-ordinate oil spill response activities throughout Nigeria;

98 Section 5 of the NOSDRA Act; see the complete document at http://www.nosdra.org/tech_info.html.

99 Section 1, ibid.

100 NOSDRA Act, Sections 1 & 2.

101 See A. M. Aba, "Bonga Oil Spill: Experts Seek Amendment of the Act", cited in Helen Agu, "An Appraisal of the Legal Regime for Environmental Management in Nigeria," being a dissertation in fulfillment of an LLM program at the faculty of law, University of Nigeria, Nsukka (2013), p. 125.

> (c) co-ordinate the implementation of the Plan as may be formulated, from time to time, by the Federal Government;
>
> (d) co-ordinate the implementation of the Plan for the removal of hazardous substances as may be issued by the Federal Government;
>
> (e) perform such other functions as may be required to achieve the aims and objectives of the Agency under this Act or any plan as may be formulated by the Federal Government pursuant to this Act.[102]

The tenor of the Act thus suggests that the Agency is not concerned with the actual remediation of the environment in cases of oil spillage.[103] The Agency is to be responsible for surveillance and ensuring compliance with all existing environmental legislation and the detection of oil spills in the petroleum sector.

There are categories of liabilities imposed under the Act. One is the penalty for not reporting an oil spill.[104] Section 6(2) thus provides:

> An oil spiller is by this Act to report an oil spill to the Agency in writing not later than 24 hours after the occurrence of an oil spill, in default of which the failure to report shall attract a penalty in the sum of five hundred thousand naira (₦500,000.00) for each day of failure to report the occurrence.
>
> (3) The failure to clean up the impacted site, to all practical extent including remediation, shall attract a further fine of one million naira.
>
> (4) Such notice in writing is deemed to have been made, if delivered at the nearest zonal office closer to the

[102] Ibid, Section 6(1). See also section 7 for special functions of the Agency, which provide for similar functions but with extended jurisdiction. Section 7(a) for instance provides that the Agency shall ensure the co-ordination and implementation of the Plan within Nigeria including within 200 nautical miles from the baseline from which the breath of the territorial waters of Nigeria is measured.

[103] Helen Agu, note 123 above.

[104] NOSDRA Act, Section 6(2).

> impacted site, and of the Agency, the National Control and Response Centre within the stipulated time in subsection (2).

By this provision, therefore, an oil polluter will be liable not for polluting the environment, but *for failing to report a spill in within 24 hours* in compliance with section 7(c) of the Act. This provision has remained a source of controversy since the inception of the Act. The reason is not far-fetched. Firstly, by the powers vested in the Agency, they can sue an oil polluter, not for the damage done, but for not reporting to the Agency within 24 hours following a spill. This may however suggest that the report will be to enable the agency carry out a prompt clean-up exercise. But as is clear from the Act, the Agency is not empowered by the Act to carry out a remediating function.[105] It can only: receive reports of oil spillages and co-ordinate oil spill response activities throughout Nigeria; co-ordinate the implementation of the Plan as may be formulated, from time to time, by the Federal Government and co-ordinate the implementation of the Plan for the removal of hazardous substances as may be issued by the Federal Government. The burden of carrying out the clean-up is by this suggested to be on the oil polluter, and that is if found liable. It therefore means that a polluter will, after paying for failing to report a spill, may still pay for the oil spill proper.

Secondly, the function of the Agency includes surveillance and the detection of oil spills in the petroleum section. This is part of the reason why the Agency was established. During oil spills such as when the causes may be uncertain, or those occasioned by the acts of third parties, failure of the Agency to detect such spills is negligent on their part and as such should not be obligatory on the oil companies.

The Act went further to impose liability for failure to clean up the impacted site, to all practical extent including remediation, which fine attracts a further fine of one million naira.[106] This provision is a welcome one and is believed to have the oil companies compelled into carrying out an effective remediation of the impacted site. It therefore implies that where the oil

[105] Helen Agu, 'An Appraisal of the Legal Regime for Environmental Management in Nigeria', submitted to the Faculty of Law, University of Nigeria, Enugu Campus, in partial fulfillment of the requirements for the award of the degree of LLM, p. 125.

[106] NOSDRA Act, section 6(4).

company fails to carry out a clean-up of the impacted environment, it will be subjected to a fine to the tune of one million Naira. The section is suggesting that, upon filing a report on an oil spill by the polluter, the Agency will direct the company to carry a clean-up of the impacted site, failure of which attracts a fine of one million Naira. Where the polluter fails to do as directed by the Agency, an action may then lie.[107] The above provisions, notwithstanding, there are still challenges left unattended to. The first is that the Agency only comes in when the polluter is known. This implies that the Agency is practically impotent in instances where the polluter is uncertain or unknown. This can either arise where the source of a spill is not readily ascertainable or where the spill is caused by the acts of third parties. Where the cause is uncertain, however, the agency can rely on the power vested on it to sue the oil company under section 6(1) (a). The section thus enables the Agency to sue an oil spiller for non-compliance with an existing legislation relating to environmental protection. Thus, where there is a violation of the provisions of ONWA, EIA, Petroleum Act, or the NESREA Act, the Agency can sue the oil company for such violations.

Another problem not covered by the NOSDRA Act is that, where the polluter is unknown, or caused by the acts of militants, for example, the Agency is practically helpless. Sadly, this factor presents the bulk of the oil spillage in Nigeria.

One other area the NOSDRA Act has brought a watershed on oil spillage cases is on the issue of compensation of the victims of oil pollution. Under section 19 of the Act, the Agency is to assess the extent of damage to the ecology by matching conditions following the spill against what existed before, undertake a post-spill impact assessment to determine the extent and intensity of damage and long-term effects and advise the Federal and State Governments on possible effects on the health of the people and ensure that appropriate remedial action is taken for the restoration and compensation of the environment.[108] This provision thus remains an opportune improvement

[107] See the Press Release by the Agency on November 23rd, 2015, <http://nosdra.org.ng/achievement.html>, where the Agency, after reminding Mobil Producing Unlimited of the fine imposed by it for failure to effect clean up the oil spill incidence at the Qua Iboe Terminal, threatened a legal action.

[108] NOSDRA Act, section 19(1)(a-c).

in the paltry compensation available in other local enactments examined earlier.

The foregoing notwithstanding, the provisions in our laws [109] appear inadequate to effect a prompt and holistic remediation of oil spillage damage in the Niger Delta region. Little wonder then that despite the existence of the very many legislation regulating the oil sector, the challenge of oil spill damage remains grossly insoluble.

The Need for the Establishment of an Oil Spill Liability Trust Fund in Nigeria

The Federal Government of Nigeria in 2016 announced its intention to clean up the Ogoniland affected by oil spillage.[110] It was also reported that the sum of one billion dollars has been earmarked for the cleanup exercise, which is believed to last between 25-30 years.[111] This effort, as plausible and appealing as it may sound, proffers only a temporary solution to the problem of oil spillage in the oil producing communities. In fact, writers have expressed strong doubt on the Federal Government's sincerity on the proposed project.[112] The fear is that this measure was perhaps only adopted by the Federal Government to have the Niger Delta Avengers tamed, since remediation of oil impacted environment is part of the conditions advanced for a ceasefire. It is therefore believed that the exercise will only serve as bait for a ceasefire agreement, and that the project will be abandoned soon after this aim is achieved or even with a change of government as is usually the case with most projects undertaken under the Nigerian politics. There is therefore need to have a fund specifically set aside for cleanup and remediation purposes.

Besides the need to have a stable fund for remediation purposes, a timely response to oil spill in Nigeria is of necessity. Unlike what obtains in the US, the response Agency in Nigeria (NOSDRA) does not carry out a

[109] And that includes the NOSDRA Act considered as watershed in oil spill control.

[110] See for instance "Lack of Funds Won't Stop Ogoni Clean-Up"(June 1, 2016) < http://punchng.com> accessed on June 06, 2022.

[111] See generally, Thomas Lazzeri, "Ogoniland Oil Spill Will Take up to 30 Years", <http://www.aefjn.org/index.php/370/articles> accessed on June 01, 2022.

[112] See for instance, N. Omame, "With $1b to Clean Up Ogoniland, Activists Still Can't Trust FG, Shell", Newswatch Time(May 22,2016) < http://www.mynewswatchtimesng.com> accessed on June 06,2021. It should be noted however that the one billion dollars was provided by the Shell Nigeria, responsible for the spill.

remediation of the impacted environment as a body.[113] Even though the Agency is charged with the responsibility for preparedness, detection and response to all oil spillages in Nigeria as set out in section 5 of the NOSDRA Act,[114]it can only direct the oil polluter to do the remediation[115] or bring an action against the company. It therefore follows that, until the suit is determined, the spillage will remain unabated. And once left unabated, there is a tendency of complication of the impact. To make matters worse, the attitude of the Nigerian courts in dispensing with oil spill cases has been generally discouraging. In *Eboigbe v. NNPC*,[116] for instance, damage from petroleum operations was caused in 1979 and was finally disposed of in 1994, after 15 years. Similarly, in *Shell v. Uzoaru*[117], the cause of action arose in 1972, was heard for the first time in the High Court in 1985 and then the Court of Appeal in 1994. More terribly is the case of *Shell v. Anaro & Ors.*,[118] which lasted for about 30 years. The damage in this case was suffered in 1985 and was finally disposed of by the Supreme Court in 2015. The implication of the foregoing is that, more harm would have been done in the course of the determination of the action, and the court generally would not alter the damages sought at the trial court to reflect the condition of the environment at the time judgment was given.

In a situation where the oil company will be unable to pay for the cleanup exercise[119] at the determination of the case, it will only take special intervention by the Federal Government to effect a remedial action. The

113 This can be gleaned from the functions of the Agency as provided for under the NOSDRA Act.

114 Section 1, ibid.

115 See for generally "Achievements of NOSDRA" <http://nosdra.org.ng/achievement.html> accessed on June 02, 2020, where it is provided that, the Agency ensures that all oil spills are cleaned up by the company responsible for the spills. Failure to clean-up promptly attracts fines to defaulters. NOSDRA has been engaged in monitoring of remediation of past impacted sites, and has inspected more than 1,150 impacted sites of various Oil Companies, out of which some have been certified as having been restored to their natural status. An inventory of past impacted sites in the country is in progress. So far, the Agency has issued remediation certificates for 269 sites. The Agency is also involved in the cleanup of Ogoniland which is being handled by the United Nations Environmental Programme (UNEP) at the behest of the Federal Government of Nigeria.

116 (1994) 5 NWLR (Pt. 347).

117 (1994)9 NWLR(Pt. 366) p. 51.

118 (2015) LPELR-24750(SC)

119 As is the case with the Ogoniland spill.

situation is even worse where the polluter is unknown or the spillage is as a result of the acts of strangers. A liability fund set aside for this purpose can be used to begin a cleanup of the affected environment in all cases pending the determination of the suit or finding.

It may however be contended that the acts of sabotage will be encouraged with such Fund readily available to clean up spills particularly the ones resulting from the acts of militancy. On the contrary, it is believed that the establishment of such a Fund will be critical in discouraging the acts of militancy in the region, with the following reasons:

- In the first place, the Fund will facilitate an effective surveillance. Oil spill control and response Agency cannot be effective with out-of-date equipment. If they must measure up with the sophisticated activities of the militants and oil bunkers, they must be adequately equipped. Where there is a scarce funding available to the NOSDRA, as the case is, this statutory function will be greatly hampered, and the bunkers or vandalizers would always have an easy sail.
- Secondly, the availability of the Fund will improve the goodwill of the oil producing communities towards the federal government. In fact, the absence of such a fund has contributed to the ill feeling and negative perception of the host communities towards the government and the rest of the regions whom they conclusively see as *reaping from where they have not sowed*. It is then not surprising that the Niger Delta Avengers had listed pollution of *their lands* and neglect of same by the federal government as one of the acts of the latter requiring vengeance.[120]

Be that as it may, it is important to keep in view that the acts of militancy are not the consensus of all the communities in the oil producing region.[121] In most cases, such acts are carried out by a group of persons with perverse minds who pursue their selfish interests and who may not even be immediate members of the affected communities. However the case, the rest of the communities should not be allowed to suffer the heinous acts of a few disgruntled or disjointed individuals who get involved in oil bunkering or vandalism. To do so would amount to gross neglect and irking of the host

[120] See generally, "Who are the Niger Delta Avengers?"(June 1, 2016), <http://www.vanguardngr.com/2016/06/niger-delta-avengers-2>accessed on June 08, 2021.

[121] See Edith Nwosu, (n 18)101.

communities, whose God-given resources are tapped and utilized while they groan under the environmental hazards which they face daily.[122] With the liability trust fund in place, this quagmire can be taken care of, especially as the Fund will be utilized for the cleanup of all the oil spillages including those occasioned by militants.[123]

Furthermore, the fund can be used to improve the efficiency of the NOSDRA.[124] It has been observed that the efficiency of the NOSDRA is greatly hampered by lack of funds.[125] This is evident from the sources of fund available to the Agency, as provided under section 11 of the NOSDRA Act. The sources are as follows:

(a) take-off grant from the Federal Government;

(b) annual subvention from the Federal Government consolidated revenue;

(c) such counterpart funding as may be provided, from time to time by a State or Local Government;

(d) loans and grants-in-aid from national, bilateral and multilateral agencies;

(e) rents, fees and other internally generated revenues from services provided by the Agency and

(f) all other sums accruing to the Agency from time to time.[126]

The above provision not only suggests that the Agency is poorly funded; it also paints a clear picture of unstable funding. Paragraph (d) for instance talks about *loans and grants-in-aid from national, bilateral and multilateral agencies as a source of fund to the Agency.* In effect, the Agency is expected to go scouting for money in order to fulfil its statutory obligations. This is clearly counterproductive.

Similarly, the annual subvention from the Federal Government consolidated revenue provided for under paragraph (c) only smacks of uncertainty. With

122 Ibid.
123 Ibid.
124 It has been argued that the effectiveness of the NOSDRA has been greatly hampered by ...poor funding (see Helen Agu (n 106).
125 Helen Agu, ibid.
126 Section 11 of the NOSDRA Act.

no percentage and rate mentioned, the provision clearly suggests that the Agency will have to wait until the grant intervenes, and they will only receive whatever is given to it by the federal government.

Also, the provision under paragraph (e) suggests that the Agency may have to heavily depend on the *rents, fees and other internally generated revenues from its services* to be funded. Inferably, by requiring the Agency to be funded by its services, the Agency can be likened to a corporation or commercial entity. That is to say, the emphasis of the Agency will be rather focused on the fees or fines than on the services rendered. Logically, therefore, since an oil company will be penalized for failing to report a spill occasioned by its facility,[127] it makes a lot of sense to conclude that the Agency might be tempted to ignore a spill within its knowledge with the intention of levying a fine on the oil company so as to raise fund for *its services.*

The analytical conclusion above is that, apart from the take-off grants from the Federal Government, the funding of the Agency is unstable and generally poor and thus reduces the effectiveness and efficiency of the Agency in the performance of its statutory obligations.

When there is stability of funding, it is believed that the Agency will be better positioned in handling the many litigations arising from oil spillage. Lawsuits involving oil spillage are not only technical; they also generally cost-demanding. This is due to the fact that expert evidence is usually required in proving the source of a spill and the extent of damaged occasioned in every case. This perhaps may have led to the abandonment of many of such litigations, which may not also be at the reach of the impoverished victims to undertake. To make matters worse, the courts would not admit of the assistance of NGO's in instituting an action involving oil spillage on the grounds of *locus standi.* This position of the Nigerian courts was reflected in the case of *Centre for Oil Pollution Watch v. Nigeria National Petroleum Corporation.*[128] The Appellant in this case is a Non-Governmental Organization (NGO) that involves in the reinstatement, restoration and remediation of environments impaired by oil spillage. It sued the Respondent at the Federal High Court, Lagos, claiming the reinstatement, restoration and remediation of the impaired environment

[127] NOSDRA Act, section 6(2).
[128] (2013) LPELR-20075(CA).

in Acha autonomous community of Isukwuato Local Government Area of Abia, resulting from a spillage occasioned by the activities of the Respondent. It also sought for the provision of portable water supply as a substitute to the soiled and contaminated Ineh/Aku Streams, which are the only major source of water supply to the community; provision of medical facilities for evaluation and treatment of the victims of the after negative health effect of the spillage and the contaminated streams. The Appellant relied on scientific report and opinion to show that the devastating effect of oil spills on the ecosystem, marine life and the forest system had persisted for several decades except when properly and constantly cleaned for several years (minimum of 5 years) and; even after 10 years of the incident that oil still remains on the affected streams/rivers causing skin diseases, cancer, damaging the reproductive system and respiratory system, of users of the affected streams. The Respondent on the other hand argued that the losses allegedly caused to the Acha autonomous community were not occasioned by the acts, omission, default, negligence or breach of duty by it, and that any damage to the pipelines within the affected community was caused by acts of sabotage or interference by unscrupulous persons within the affected environment. It also contended that the Appellant lacked the requisite *locus standi* to institute and maintain action as presently constituted, as the Appellant has neither suffered damage nor been affected by the injury allegedly caused to the Acha Community and then prayed the Court to dismiss this suit for lacking merit.

The trial Court per A. R. Mohammed J. ruled in favour of the Respondent, holding that nothing could show that the Plaintiff as a legal entity had suffered any injury or damage as a result of the alleged oil spill in Acha Community. The Court also rejected the reliance of the Appellant on English cases in establishing a standing as an attempt *to pull wool over the eyes of the court.* On appeal, the Court of Appeal upheld the decision of the lower court and dismissed the suit for lacking in merit.[129]

[129] It is rather sad that even though the Court of Appeal recognized the possibility of this case succeeding in other jurisdictions like India, England and Australia, it went ahead to hold that the protection of public interest by NGO's is not known to our jurisdiction. As was held in *Gbemre's case*, contamination of the environment affects the fundamental rights to life of the citizens, and the requirement of *locus standi* is dispensed by the 2009 Enforcement Rules on Fundamental Human Rights. It is hoped

It is believed that if the NOSDRA had sufficient fund available to it, such a case as this would normally be instituted by it[130] on the complaint of the host communities who may not be financially capable to prove their cases. In the United States, the Environmental Protection Agency (EPA) will take civil or criminal enforcement action against violators of environmental laws. Accordingly, communities which are disproportionately affected by pollution can be assisted through the EPA Cleanup enforcement programs which include: finding the companies or persons responsible for the contamination, negotiating with them to perform the clean up themselves, or ordering them to perform the clean up, or to have them pay for the cleanup performed by another party or EPA.[131]

Another important reason why the liability trust fund is needed in Nigeria is to deal with the issue of compensation.[132] Section 19(1)(c) of the NOSDRA Act provides that the Agency shall assess the extent of damage to the ecology by matching conditions following the spill against what existed before (reference baseline data and ESI maps), and undertake a post-spill impact assessment to determine the extent and intensity of damage and long-term effects. It follows that since the Agency has been empowered to *assess the extent of damage to the ecology* and *undertake a post-spill impact assessment to determine the extent and intensity of damage and long-term effects,* the affected community can be paid compensation out of the fund.[133] This will in the main resolve the problem of inadequate damages usually awarded by the Nigerian courts after unduly prolonged years of legal battle.

In the same vein, the Fund can be used as a palliative measure during the period of cleanup. For instance, where the communities affected by a spill no longer have access to clean water, as was the case in *Centre for Oil*

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that if the Supreme Court gets the opportunity to hear the appeal of this case, it will not hesitate to upturn the decision of the lower courts.

130 It should be noted that this is one of the statutory duties of the Agency as provided under section 19(1) (b)(c) of the NOSDRA Act.

131 See generally, "Enforcement Basic Information", <https://www.epa.gov/enforcement/enforcement-basic-information>accessed on June 04, 2021.

132 Alternatively, a person or organization that has incurred removal costs or suffered damages due to an oil spill, including uncompensated removal costs, damages to property, loss of profit claims, third party claims, or a range of other direct costs as specified in the Oil Pollution Act, and can be funded by the OSLTF(see U.S COAST GUARD, "The Oil Spill Liability Trust Fund", <http://www.uscg.mil/npfc/About_NPFC/osltf.asp> accessed on May 30, 2021.

133 Nwosu, (n 18).

Pollution Watch v. Nigeria National Petroleum Corporation,[134]part of the Fund can be made available for the construction of boreholes for the communities[135] pending the completion of the cleanup exercise. This practice accords with the concept of sustainable development, which has been defined as *development that meets the needs of the present without compromising the ability of the future generations to meet their own needs.*[136]

It is important to note however that for the operational logistics towards the implementation of Plan (Tier 3) oil spill combat, it is provided in the National Oil Spill Contingency Plan that all relevant Ministries/Agencies directly concerned shall participate in the funding arrangement. Such function that could be carried out and funded by co-opted ministries and agencies in the event of major oil spill include setting up medical outposts and mobilization of medical personnel and drugs, etc (by the Ministry of Health); provision of barges and storage for recovered oil, etc (by the NPA); Construction of structures for the settlement of victims and access road to scene of incident, etc (by Federal Ministry of Works & Housing); provision of boreholes for water supply, (by Federal Ministry of Water Resources and Rural Development).[137] This might suggest that the need to push for this performance by the NOSDRA may have been dispensed with since the participating Agencies/Ministries will have to contribute in terms of the funding. This would have been the case, but for the inherent limitations below.

134 (supra).

135 For instance, the agency has recently undertaken an inventorisation of the existing oil spill containment pits abandoned by oil producing companies in Niger-Delta in order to convert them to arable lands for economically viable activities such as aquaculture. Some sites have already been selected as pilot projects based on some support from the MDGs office, but funding will be a major hindrance in the execution of the project.(see generally, National Oil Spill Detection and Response Agency, "Achievements", <http://nosdra.org.ng/achievement.html> accessed on June 06, 2023).

136 See generally Ajah and Ogbuabor, "Striking a Balance Between International Trade, Sustainable Development and Human Rights," *The Nigerian Juridical Review,* Vol 11(2013) pp. 163-199.

137 Second schedule to the NOSDRA Act.

First is that the provision only covers the control of a Tier 2 or Tier 3 spill,[138] and does not make room for Tier 1. Secondly is that the bureaucratic bottlenecks prevalent in such entities and the ever present lack of fund syndrome may not allow the workability of this objective especially in an emergency situation.[139] The conclusion of the above analysis is that a Liability Trust Fund is panacea in solving the intractable post-spill problem in Nigeria.

Establishment and Funding of the Liability Trust Fund

Section 80(1) of the 1999 Constitution contemplates the establishment of some funds for specific purposes by the National Assembly. In the exercise of this constitutional obligation, the National Assembly has overtime established some Trust Funds with sources of funding principally coming from the petroleum industry. None of the funds however is specific on the remediation of the environment ravaged by oil spillage.[140] For instance, the Petroleum (Special) Trust Fund[141], established for the identification, funding and execution of projects in various sectors, and for matters such as the provision of road and road transportation including waterways, education, health, food supply, water supply and security services[142]throughout the federation. This Trust Fund has as a source of funding all the monies received from the sale of petroleum products less the approved production cost per litre,[143] and is managed solely at the discretion of the President.[144]

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138 Thus the participating Agencies will not have to come in where tier 1 is involved, which is not deserving of a lesser attention.

139 See Ken Ezeibe, "The Legislative and Institutional Framework of Environmental Protection in the Oil and Gas Sector in Nigeria – A Review", *Nnamdi Azikiwe University Journal of International Law and Jurisprudence,* Vol 2 (2011),ahttp://www.ajol.info/index.php/naujilj/article/view/82386(last accessed May 25, 2020.

140 The paper argues that the Host Communities Development Trust Fund contemplated under the Petroleum Industry Act 2021 still falls shy in many respects. Among other things, the trust contemplated therein shifts the responsibility of establishing the trust to the settler, which will make implementation weak. Again, the fund available to the trust is not specific on oil spillage but on the development of the host communities generally.

141 Established by the Petroleum (Special) Trust Fund Act.

142 Petroleum (Special) Trust Fund Act, section 3(d).

143 Section 1(1), ibid.

144 Section 1(3), ibid. Even though there is a Board that manages the fund (see section 2 of the Act), their functions are subjected to the directives of the President by virtue of

We have also the Petroleum Equalisation Fund,[145] established for the purpose of reimbursing oil marketing companies for any loss they sustain in the course of the sale by them of petroleum products at uniform prices throughout Nigeria.[146] And then we have the Petroleum Technology Development Fund,[147] established for the purposes of training and education of Nigerians in the petroleum industry.[148] It is important to note that the establishments of the funds above were prompted by the need for them at a particular time. In the same vein, it is now timely for the National Assembly to exercise its constitutional power to enact an Act establishing the Oil Spill Liability Trust Fund, for the purpose of remediating the environment and victims affected by oil spillage in Nigeria.

The fund should have monies paid therein from the following sources:

(i) **Barrel Tax:** This shall be made up of taxes levied per barrel of crude oil at the point of production. The rate of the tax so levied shall be determined by the Minister charged with Petroleum Affairs from time to time.

It may be contended that the barrel tax will constitute an additional burden on the oil companies in Nigeria, and that this may negate the efforts of the Federal Government to attract investors in that section. This paper contends otherwise. The reason is that the oil companies already enjoy an abundant incentive under the Petroleum Profit Tax Act.[149] The deductions allowed therein are such that are hardly obtainable in other jurisdictions.[150]

section 22 of the Act. The implication of this is that the Nigerian factor will always play out, as the lion share of the fund would usually go to the region whence the President comes. This is not a pleasant arrangement considering the structure of the Nigerian federation.

145 Established by the Petroleum Equalisation Fund (Management Board etc) Act, Cap P11 LFN 2004.

146 This Fund is now redundant following the Federal Government recent announcement that it will discontinue this subsidy.

147 Established by the Petroleum Technology Development Fund Act, which repealed the Gulf Oil Company Training Fund (Administration) Act1964.

148 Petroleum Technology Development Fund Act, section 1.

149 Cap P13 LFN 2004. See for instance Section 10

150 See for instance the case of *Shell v. FBIR (1994)* 6NWLR (Pt.466) p.1.

(ii) **Secondly, 25 percent of the monies accruing to the Niger Delta Development Commission.**

This should also be a source of fund available to the Liability Trust Fund. The reason for this is that, part of the functions of the NDDC is to tackle ecological and environmental problems that arise from the exploration of oil mineral in the Niger-Delta area,[151] and since the Fund would also be used for the provision of palliatives in the oil polluted regions, it stands to reason that instead of have all the 3 percent of the total annual budgets of any oil company in the Region paid into the NDDC Fund, as provided under section 14 of the NDDC Act, 25 percent of this should be paid into the Liability Trust Fund.

(iii) All the monies accruing to the Petroleum Equalization Fund.

This is flowing from the fact the federal government has announced its unwillingness to continue with the oil subsidy regime.

(iv) All sums recoverable by the agencies from oil polluters in any litigation on oil spillage.

This practice accords with the polluter pays principle applicable in jurisdictions aforementioned in the preceding chapter. Thus, assessment of damage by the oil spill could be done by the NOSDRA pursuant to the NOSDRA Act, and this may be paid to the affected victims of oil pollution and subsequently recovered by the NOSDRA from the polluters.

Management and Operation of the Fund

NOSDRA is a specialized and principal Agency on environmental protection in the oil and gas sector in Nigeria[152] under the Ministry of the Environment.[153] It is vested with the responsibility to co-ordinate the

[151] See section 7 of the NDDC Act.

[152] Ezeibe, (n 28), p.44. It should be noted that with respect to oil pollution on marine pollution, it has been contended that the Nigerian Maritime Administration and Safety Agency (NIMASA) shares jurisdiction with NOSDRA. (See Ezeibe, note 28 above, p. 53). A careful examination of the NIMASA Act however shows that the objective of NIMASA does not contemplate oil pollution. The maritime pollution contemplated under sections 44 and 45 of the Act is limited to the dumping of ship and shore generated waste in Nigerian waters; removal of wrecks which constitute navigation risks and which is a threat to the marine environment and carrying or jettisoning harmful substances in packed form.

[153] See "Agencies/Parastatals" <http://environment.gov.ng/index.php/about-moe/agencies-parastatals> accessed on June 06,2020.

implementation of the National Oil Spill Contingency Plan (NOSCP) for Nigeria in accordance with the International Convention on Oil Pollution Preparedness, Response and Co-operation (OPRC) 1990, to which Nigeria is a signatory.[154] Pursuant to section 19(2) of NOSDRA Act, however, the Agency is mandated to co-opt and collaborate with the various Ministries/Agencies[155] in the event of a major Tier 2 or Tier 3 oil spill,[156] in respect of their various functions.[157] The foregoing analysis suggests that NOSDRA is the lead Agency in all maters respecting the control of oil spill in Nigeria.[158] The Oil Spill Liability Trust Fund can be made a principal source of fund available to the NOSDRA. The Board overseeing the Fund can comprise representatives from the NOSDRA, Ministries of the Environment and Ministry.

An amount not exceeding 40 percent may be made withdrawn from the Fund in responding to a spill at any given time. Therefore, in cooperating with any Agency/Ministry in handling any tier oil spill, the Fund can be made available. This will help to eliminate the excuses usually given by such Agencies/Ministries in lending helping hands in moments of disastrous oil spill. Ultimately then, the Fund can be accessed by the NOSDRA to handle litigations arising from oil spillage. At the determination of each suit, and where the polluter is found liable, the polluter will be made to reimburse the Agency in accordance with the "polluter pays principle."[159]

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154 See "National Oil Spill Detection and Response Agency(NOSDRA)" < http://environment.gov.ng/index.php/about-moe/agencies-parastatals/nosdra(> accessed on June 06,2021..

155 The Ministries/Agencies include: The Nigerian Institute of Oceanography and Marine Research; the Federal Ministry of Works; the Federal Ministry of Health; the Federal Ministry of Transport; etc. See generally, Second schedule to the NOSDRA Act.

156 None of the tier oil spill was defined in the Act. However, it has been suggested that tier levels focus around the volume of oil spilled and location of the spill. See "Guide to Tiered Preparedness and Response", <www.amn.pt/DCPM/Documents/Tiered Response.pdf> accessed on June 06, 2021).

157 Second schedule to the NOSDRA Act.

158 See section 19(2) of the NOSDRA Act, which provides that the Agency (NOSDRA) shall act as the Lead Agency for all matters relating to oil spills response management and liaise with the other Agencies for the implementation of the plan, as contained in the Second Schedule.

159 Nwosu, above note 12, pp.106-107.

Conclusion

The snag is not so much with its occurrence as it is with the consequent impact and remediation of the environment. Thus, while oil spillage may often inevitably occur in the process of petroleum operations and with the activities of third parties, its control can be handled effectively. Sadly, our laws as they are currently appear grossly inadequate in tackling the impacts of oil spillage. This usually leaves the victims of oil spillage, who are usually members of the communities hosting the production of oil, out of which the whole nation is fed, helpless in seeking remedy in cases of oil spillage. Thus, the inability of the Nigerian government to review our laws relating to oil pollution may have prompted the agitation and the current heinous moves by the militants. The result is more spill and more damages. All the same, the federal government, in compliance with the International Convention on Oil Pollution Preparedness, Response and Co-operation (OPRC) 1990, to which Nigeria is a signatory, established the National Oil Spill Detection and Response Agency (the NOSDRA), and charged same with the responsibility of oil spill control. However, a review of the Acts[160] establishing the Agency shows that the current positioning of same is unsuited in handling oil spillages. The fact that the agency does not carry out remediation activities is a sufficient regret. Thus, in situations where the polluter is unable to clean up the spill, or where the source of the spill is unknown, the affected environment will remain unattended to. This makes the practices in foreign jurisdiction especially in the US, more apposite in handling oil spill cases. Lack of fund has generally contributed to the inefficiency of the Agency, especially in this regard. It is crucial to have a fund set aside specifically for remediation purposes. The fund will serve to better position the Agency in handling oil spill cases especially as regards both carrying out remediation and clean-up of the environment and compensation of the victims affected by the spill resulting from petroleum operations as well as the acts of third parties. The fund can be administered by the Agency to carry out the remedial actions above as soon as a spill results, irrespective of the cause. The Agency may now carry out legal actions against the spiller who would then be made to pay for the expenses incurred by the Agency. This practice accords with the polluter pays principle effectively applied in foreign jurisdictions. The requirement of having the polluter pay for the remediation of the environment also

[160] That is, the NOSDRA Act, 2006.

complies with the concept of sustainable development globally acknowledged as inevitable for the survival of human on earth.